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83-404

IN THE SUPREME COURT
OF THE UNITED STATES

No. _____

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Respondent,

vs.

RANDOLPH SIMMERSON, [1]

Petitioner.

PETITION FOR WRIT CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Counsel of Record

[1]In the Court of Appeals, this matter was heard as a portion of a joint appeal including the following parties other than those named in the caption: Danny Stutts, Charles David Cauble, Dwight Williams, Rodney Lynn Guion and William Murdock.

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURTS BELOW ERRED IN PERMITTING PROSECUTION UPON AN INDICTMENT TAINTED BY INVASION OF THE SANCTITY OF THE GRAND JURY PROCEEDINGS.

II. WHETHER THE CONVICTION AND AFFIRMANCE BELOW WAS VIOLATIVE OF THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW BY REASON OF THE OUTRAGEOUS AND OVER-REACHING CONDUCT OF LAW ENFORCEMENT AGENTS.

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21 U.S.C. 963 1,2
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OPINION BELOW

The judgment sought to be reviewed was entered on July 11, 1983. The opinion was unpublished, and a copy of the same is attached hereto as Appendix A, infra, pp. A-3 through A-10, and listed as Case No. 82-5314.

GROUNDS OF JURISDICTION

The statutory provision conferring jurisdiction will be found at Title 28, United States Code, Section 1254(1); and Title 28, United States Code, Supreme Court Rules; Rule 17.1(a).

STATUTES INVOLVED

21 U.S.C. §§841(a)(1), 841(b)(1)(B), 841(b)(6)
21 U.S.C. §846
21 U.S.C. §952(a), 963
18 U.S.C. §2[2]

STATEMENT OF THE CASE

Defendant, along with four co-defendants, was tried in United States District Court for the Western District of North Carolina, before a jury, on a bill of indictment charging violations of Tile 21, United States

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[2]Text of statutes are set forth in the Appendix hereto.

Code, §§846, 841(a)(1), 952(a) and 963, and Title 18, United States Code, §2. The substance of the charges against Simmerson was that on or about August 12, 1982, he gave approximately $9,900.00 to co-defendant Guion for advance expenses in obtaining an aircraft for the purpose of smuggling over 1,000 pounds of marijuana from Jamaica into the Western District of North Carolina, knowing the purpose for which the money was to be used, and that such advancement of money by Simmerson was part of a conspiracy to import, intentionally and knowingly distribute, and possess with the intent to distribute over 1,000 pounds of marijuana, a controlled substance as defined in Title

21, United States Code, §812, Schedule I. Simmerson was further charged in two counts with aiding and abetting such importation and distribution by the above transfer of money to Guion.

Simmerson entered a plea of not guilty to all four counts in which he was charged (1, 2, 4 and 5) and was tried by jury on October 21-30, 1982, before the Honorable Robert D. Potter. The evidence at trial revealed that beginning mid-to-late May, 1982, Walter "Smiley" Brown, a paid government informant acting under instructions from FBI Agent Hennigar and DEA Agent Ingram, met at least six times with Guion to discuss marijuana smuggling. Brown and Guion initially renewed their high school acquaintance, interrupted over

twenty years, and discussed general topics. At their third meeting, the topic of marijuana smuggling emerged, with disputed testimony as to who originated it. The meeting ended with Guion attempting to locate a Jamaican source for approximately 400 pounds of marijuana and Brown supplying and piloting the aircraft to be used. Brown informed authorities of these conversations.

June 8, 1982, on instructions from Agents Hennigar and Ingram and outfitted with an electronic eavesdropping device, Brown again met Guion and suggested a second pilot be used. This second pilot was in reality DEA Agent Adams who was introduced to Guion by Brown June 24, 1982, as an experienced drug pilot

who would assist in flying the marijuana into the country. This trip never reached fruition according to Adams' testimony as Guion was unable to raise the money that Adams advised he would need to import the marijuana. Although Guion made no plans or arrangements to contact Adams further, Adams persisted in calling Guion every two to four days attempting to arrange another trip. Guion finally arranged financing by borrowing $10,000.00 from petitioner Simmerson who thought that Guion needed the money for business purposes at the Lakeside Marina, and who demanded and received two titles to boats owned by Guion as collateral for the loan. On the day Guion borrowed the $10,000.00 from Simmerson, August 12, 1982, Guion

proceeded to the Charlotte, North Carolina airport where he gave Adams $9,900.00. The trip was then arranged and made August 24-26, 1982, using a specially equipped government airplane provided by DEA Agent Adams and surveilled by government agents. All defendants except Simmerson were arrested in the vicinity of Statesville, North Carolina, at or shortly after the airplane loaded with marijuana landed.

The jury returned a verdict of guilty as to Simmerson on all four counts. Simmerson was sentenced to consecutive eight-year terms on counts one and two, and consecutive two-year terms on counts four and five, for a total of twenty years imprisonment. Additionally, on counts two, four and

five Simmerson was sentenced to consecutive special parole terms of two years, for a total of six years special parole term.

Simmerson appealed to the United States Court of Appeals for the Fourth Circuit and the judgment was affirmed July 11, 1983. The Fourth Circuit did not examine the probative value or prejudicial impact of the evidence other than addressing defendant Murdock's claim that the district court wrongfully denied his request for jury instruction on withdrawal from the conspiracy. All other contentions of all defendants were found to be without merit without further comment.

From the foregoing judgment and affirmance, Simmerson respectfully

petitions this honorable Court to determine if the government may be permitted to allow an instrusion into the grand jury room by unauthorized government personnel delivering unidentified documents to the attorney for the government and whether the government may permit its agents to behave in such outrageous and overreaching conduct that due process and fundamental fairness are completely abandoned in the agents' zealousness to obtain convictions.

ARGUMENT

I. THE TRIAL COURT ERRED IN REFUSING TO DISMISS THE INDICTMENT BECAUSE OF GRAND JURY TAINT.

Counsel for defendants requested statements of the witness Ingram, pursuant to 18 U.S.C. §3500. Since Ingram was the only person to appear before the grand jury that returned this indictment, the tape of the grand jury proceedings was provided to defense counsel. Counsel were permitted to listen to the tape during a lunch recess. Contained in the tape was an instance where an employee of the U. S. Attorney's Office, not authorized to be present in the grand jury, entered the grand jury room with unidentified documents. Defense counsel brought this to the Court's attention and moved to dismiss the indictment as a result of this grand jury taint. The government responded and conceded that an

unauthorized person had entered the grand jury room.

It is a long-standing and recognized rule in federal courts that the mere appearance of an unauthorized person before a grand jury is a sufficient ground for dismissal. United States vs. Echols, 542 F.2d 948 (5th Cir. 1976); Latham vs. United States, 226 F. 420 (5th Cir. 1915). Defense counsel are aware of United States v. Rath, 406 F.2d 757 (6th Cir. 1969), which the government may argue. But in Rath, an attorney mistakenly wandered into the grand jury room and left within twenty seconds of his entry. Our facts bear no similarity to Rath. In this case, the government allowed supportive

personnel to enter the grand jury room and deliver an unidentified document.

"[T]he grand jury is not meant to be the private tool of a prosecutor." United States vs. Fisher, 455 F.2d 1101, 1105 (2nd Cir. 1972). When the prosecutor allows his office staff privileges before the grand jury that witnesses, attorneys for witnesses, and even grand jury members are denied, he is using that body as a private tool. There is a great probability of and, perhaps, even certain prejudice to the grand jury system in this regard. It is possible that some improper influence or suggestion was made in the grand jury room through the use of the unidentified documents. The court, when apprised of these facts, took no steps to inquire

further of the government who the staff member was that entered the grand jury room or what the unidentified document was and what it had to do with the matter before the grand jury. Clearly, the trial court should have done more than turn a deaf ear and a blind eye to this violation of the sanctity of tne grand jury room.

The Fourth Circuit recently addressed this same issue in United States v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. 1982). In that case, a grand jury investigation lasted eighteen months, during which intrusions by unauthorized persons occurred on five occasions. Relying heavily on the duration of the entire proceedings as a "significant measuring background,"

supra, at 1185, the Court held that a dismissal of the indictment was not appropriate. The opinion indicated that for a prosecution which required only a day or two or a week or two to complete its grand jury work might not suffer the same fate. In our case, the grand jury presentation lasted less than one hour, during which time the unauthorized intrusion occurred. The language of that case seems particularly appropriate here:

> Prosecutors should not consider what we have written as in any way amounting to an encouragement to depart from scrupulous compliance with Fed. R. Crim. P. 6(d). Having been fortunate enough to survive the attack here by the skin of their teeth on the basis of a record as a whole, they cannot count with any assurance on a similar conclusion on another record

involving unauthorized grand jury room intrusions.

Supra, at 1186.

Unquestionably, there was an unauthorized intrusion into the grand jury room. Because the trial court took no steps to determine the nature of the intrusion and because the government made no effort to explain the unidentified document, this court is left to speculate as to what occurred before the grand jury. Defense counsel brought this matter to the court's attention and have shown the possibility of prejudice by the very nature of the intrusion and the document being given to the prosecutor. Neither the trial court, nor the government did anything to counter the allegation of prejudice to

these defendants. Thus, this court should dismiss the indictment for grand jury taint.

II. THE CONDUCT OF THE LAW ENFORCEMENT AGENTS WAS SO OUTRAGEOUS AND OVERREACHING THAT DUE PROCESS AND FUNDAMENTAL FAIRNESS SHOULD BAR THE GOVERNMENT FROM INVOKING THE JUDICIAL PROCESS TO OBTAIN A CONVICTION.

Simmerson contends that the court erred by not entering judgment of acquittal because the extent of government "overreaching" amounted to a deprivation of due process rights. In United States vs. Russell, 411 U.S. 423 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973), this Court accepted the proposition that

in certain cases, "the conduct of law enforcement agents (may be) so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." 411 U.S. at 431-32, 93 S.Ct. at 1642-43. Following Russell, this Court in 1976 issued a plurality opinion in the last of the cornerstone entrapment cases, Hampton vs. United States, 425 U.S. 482, 96 S.Ct. 1646. A majority of the court rejected the position "that the defense of entrapment necessarily is the only doctrine relevant to cases in which the Government has encouraged or otherwise acted in concert with the defendant." Id. at 492 N.2, 96 S.Ct. at 1651 n.2. Most recently, the Third Circuit relied

on the directives of the Fifth and Fourteenth Amendments to the Constitution in stating that although proof of predisposition to commit the crime will bar application of the entrapment defense, fundamental fairness will not permit any defendant to be convicted of a crime in which police conduct was "outrageous." United States v. Twigg, 588 F.2d 373 (3rd Cir. 1978). In Twigg. the Court found that DEA agents "set up" the defendant, "encouraged him," and "provided the essential supplies and technical expertise." Id. at 381.

The "outrageous" conduct of the police officers that formed the basis of the due process defense in Twigg also appear in this case. Fundamental

fairness must also bar prosecution in the present case. Law enforcement conduct here violates that "fundamental fairness, shocking to the universal sense of justice," mandated by the Due Process Clause. United States vs. Russell, 411 U.S. at 431-32, 93 S.Ct. at 1643. The record is replete with instances of government overreaching. It was not sufficient for the government to monitor the situation once knowledge was gained that a crime may be committed, nor was it satisfactory to them to simply infiltrate the proposed plan and arrest the guilty parties at the culmination of the criminal act. Instead, the government guaranteed that the crime would be accomplished by virtue of its overreaching involvement.

Simmerson loaned co-defendant Guion the sum of $10,000.00 for what Simmerson believed to be legitimate business purposes. The money was to be repaid in sixty days, according to Guion, and Simmerson obtained the titles to two boats owned by Guion as security for the loan. Guion testified that Simmerson never knew about the marijuana and believed the money so loaned was to be used by Guion in buying into a beach club. Guion further testified that his deal in buying into the beach club fell through and, finding himself under pressure from DEA Agent Adams to come up with the money to rent a plane, Guion used the money loaned to him by Simmerson for this purpose. Guion would

never have had the occasion to use the money for this purpose had it not been for the badgering of DEA Agent Adams and government informant Brown. Brown called his home no less than six times in an effort to consummate the marijuana deal. The evidence is conflicting as to whether government informant Brown or Guion initiated the conversation as to marijuana smuggling, but the testimony of a government informant witness, who admittedly has something to gain as a result of his actions, must be scrutinized with the same care as the testimony of a defendant who stands to gain if he can discredit the government informant witness. Brown, additionally, introduced DEA Agent Adams to Guion as

"an experienced pilot" who knew about the marijuana smuggling business. Agent Adams explained the essentials of importing large amounts of marijuana, including the size of planes needed, length of airstrip, weight and flying considerations; he supplied two flight charts, suggested a larger type of airplane and told Guion how much money would be needed to complete the venture. Adams even offered to investigate the situation as to its feasibility for Guion. In fact, Guion told Adams that he could not come up with the money, and abandoned the plan with no arrangements to contact Adams after the plan fell through. However, Adams was not to be deterred and subsequently made at least nine telephone calls to Guion in an

effort to reactivate the plan. The government was most helpful in this venture, supplying the pilots to fly to Jamaica and back, the government airplane to be used, specially gutted and streamlined as well as equipped with special long distance fuel tanks. Government agents flew the aircraft to and from a foreign country, assisting in the locating and loading of marijuana in Jamaica, and paying for part of the fuel to be used.

Clearly, the government agents overstepped reasonable bounds in the constant telephoning of Guion after he abandoned plans to smuggle marijuana. This, coupled with the government's aid and expertise, in arranging the uninterrupted flight over and back,

should not be tolerated. If a person has abandoned the idea of committing an illegal act, for whatever reason, the government should not be allowed to badger or tempt him into committing it. If a person has decided not to commit a crime, the government should not be allowed to encourage him to change his mind.

CONCLUSION

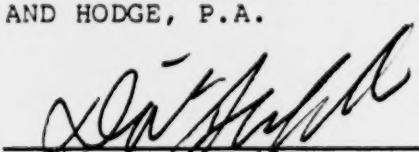
This case presents the opportunity to reaffirm the sanctity of grand jury deliberations against encroachment and erosion.

This case can likewise be important in its effect on the increasing active involvement of law enforcement agents in the procuring of criminal activity

for the purpose of possible prosecution.

Each of these issues is timely, important and necessary to the continued "fundamental fairness" which our country has always deemed essential to our unique system of justice.

TUCKER, HICKS, SENTELLE, MOON AND HODGE, P.A.

By: 

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APPENDIX

Judgment and Commitment A-1

Opinion of the Fourth Circuit Court of Appeals A-3

Order -- Fourth Circuit -- Denying Stay of Mandate A-9

Text of Statutes Cited A-10

EXHIBIT A

THE WESTERN DISTRICT OF NORTH CAROLINA

STATESVILLE DIVISION

United States of America vs.

Randolph Simmerson.

Docket No. ST-CR-82-22-10

In the presence of the attorney for the indictment the defendant appeared in person on this date -- October 30, 1982
WITH COUNSEL Allen Bailey and Tom Dickenson (both retained)
PLEA [X] NOT GUILTY
there being a verdict of [X] GUILTY by the jury in Counts 1, 2, 4 & 5.

Defendant has been convicted as charged of the offense(s) of conspiracy to distribute and to possess with intent to distribute over 1,000 lbs. of marijuana, a Schedule I substance, in violation of 21 U.S.C. 841(a)(1), all in violation of 21 U.S.C. 846, as charged in Ct. 1; aiding & abetting in distributing & possessing with intent to distribute over 1,000 lbs. of marijuana, a Schedule I substance, in violation of 21 U.S.C. 841(a) and 18 U.S.C. 2, as charged in Ct. 2; aiding & abetting in unlawfully importing marijuana, a Schedule I controlled substance, in violation of 21 U.S.C. 952(a) and 18 U.S.C. 2, as

charged in Count 4; conspiracy to illegally import marijuana, a Schedule I controlled substance in violation of 21 U.S.C. 963, as charged in Ct. 5.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or apeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Count 1 - EIGHT (8) years

Count 2 - EIGHT (8) years + special parole term of TWO (2) years consecutive with sentence imposed in Count 1

Count 4 - TWO (2) years + special parole term of TWO (2) years consecutive with sentence imposed in Count 2

Count 5 - TWO (2) years consecutive with sentence imposed in Count 4

/s/ _____
Robert D. Potter

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-5310

United States of America, Appellee,

-v-

Danny Stutts, Appellant.

No. 82-5311

United States of America, Appellee,

-v-

Charles David Cauble, Appellant.

No. 82-5312

United States of America, Appellee,

-v-

Dwight Williams, Appellant

No. 82-5313

United States of America, Appellee,

-v-

Rodney Lynn Guion, Appellant.

No. 82-5314

United States of America, Appellee.

-v-

Randolph Simmerson, Appellant.

No. 82-5315

United States of America, Appellee.

-v-

William Murdock, Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Statesville. Robert D. Potter, Judge.

Argued June 10, 1983 Decided July 11, 1983

Before WINTER, Chief Judge, WIDENER, Circuit Judge, and BUTZNER, Senior Circuit Judge.

David Sentelle, Karen Mashburn, Harold J. Bender (Theo X. Nixon, Keith M. Stroud, John E. Hodge, Jr., and James D. Hill on brief) for appellants; Debra J. Stuart, Assistant United States Attorney (Charles R. Brewer, United States Attorney on brief) for appellee.

PER CURIAM:

Danny Stutts, Charles David Cauble, Dwight Williams, Rodney Lynn Guion, Randolph Simmerson, and William Murdock were convicted by a jury of various

charges arising out of a conspiracy to import and distribute illegally over 1000 pounds of marijuana. They appeal from their convictions and raise 13 assignments of error.

We have carefully considered each of the appellants' arguments and find them all to be without merit, except for Cauble's contention that he received a duplicitous sentence. Cauble was convicted under count three of the indictment of possession with intent to distribute over 500 pounds of marijuana in violation of 21 U.S.C. Section 841(a)(1), and under count two of aiding and abetting possession with intent to distribute over 1000 pounds of marijuana. He received separate, consecutive sentences of imprisonment

for each conviction. Every element necessary to prove count three, however, is also an element of count two and arose out of the same transaction. It therefore was improper to sentence him separately for each conviction. Accordingly, we vacate Cauble's sentence under count three of the indictment. See United States v. Amos, 566 F.2df 899, 901 (4th Cir. 1977).

The only other issue meriting comment is Murdock's claim that the district court wrongfully denied his request for a jury instruction on withdrawal from the consipiracy. "Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally

been regarded as sufficient to establish withdrawal or abandonment." United States v. United States Gypsum Co., 438 U.S. 422, 464-65 (1978). Furthermore, withdrawal must be completed before the object of the conspiracy is achieved. See 4 C. Torcia, Wharton's Criminal Law § 734 (14th ed. 1981).

Murdock was charged with the conspiracy to import and conspiracy to distribute the marijuana. There was sufficient evidence linking Murdock to the conspiracy prior to the time the marijuana was brought into the United States. Murdock testified, however, that when some of the other defendants brought the load of marijuana to his home to be divided, he became angry and ordered one of the defendants to "get

that stuff out of here." He claimed he then left the area, although F.B.I. agents testified they later observed Murdock using his truck to guard the entrance to his property as other conspirators moved the marijuana.

Murdock made no attempt to withdraw prior to the achievement of the object of the conspiracy to import. In addition, his request to get the marijuana off his property was not inconsistent with the object of the conspiracy to distribute the marijuana. The district court, therefore, did not err in refusing to give Murdock's requested jury instruction. See also United States v. Wooten, 688 F.2d 941, 946-47 (4th Cir. 1982).

No. 82-5310 - AFFIRMED;

No. 82-5311 - AFFIRMED IN PART AND VACATED IN PART;
No. 82-5312 - AFFIRMED;
No. 82-5313 - AFFIRMED;
No. 82-5314 - AFFIRMED;
No. 82-5315 - AFFIRMED.

EXHIBIT C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-5314

United States of America, Appellee,

-v-

Randolph Simmerson,
Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Statesville. Robert D. Potter, District Judge.

Upon consideration of a motion of the appellant, for stay of mandate pending application to the Supreme Court of the Untied states for a writ of certiorari,

IT IS ORDERED that the motion is DENIED.

For the Court - by Direction

_____

Clerk

EXHIBIT D

APPENDIX

Title 21, United States Code, Section 841(a)(1):

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--
>
> (a) To manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . ."

Title 21, United States Code, Section (b)(1)(B)

> In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4), (5), and (6) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony

under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marijuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

Title 21, United States Code, Section 841(b)(6)

In the case of a violation of subsection (a) of this section involving a quantity of marihuana exceeding 1,000 pounds, such person shall be sentenced to a term of imprisonment of not more than 15 years, and in addition, may be fined not more than $125,000. If any person commits such a violation after one or more prior convictions of such person for an offense punishable under paragraph (1) of

this paragraph, or for a felony under any other provision of this subchapter, subchapter II of this chapter, or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, and in addition, may be fined not more than $250,000.

Title 21, United States Code, Section 846:

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Title 21, United States Code, Section 952(a);

It shall be unlawful to import into the customs territory of the United States from any place outside thereof (both within the United States) or to import into the United States from any place outside thereof, any controlled substance in schedule I or II or

subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter. . .

Title 21, United States Code, Section 963:

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Title 18, United States Code, Section 2:

(a) Whoever commis an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that David B. Sentelle, Attorney for Petitioner, Randolph Simmerson, has this day served a copy of the foregoing Petition upon the Solicitor General of the United States and the United States Attorney by depositing the same in the United States mail postage prepaid and properly addressed to:

Solicitor General of the United States
Room #5614
Department of Justice
Washington, DC 20530

United States Attorney
The Charles R. Jonas Federal Building
401 West Trade Street
Charlotte, NC 28202

This the 8th day of September, 1983.

David B. Sentelle
Attorney at Law
(Admitted to the Supreme Court Bar)
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